

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

JERRY BROWN

PLAINTIFF

VS.

NO. 4:01CV157-D-B

ASCENT ASSURANCE, INC., ET AL.

DEFENDANTS

OPINION

Presently before the court is the Plaintiff's motion to remand this matter to the Circuit Court of Humphreys County, Mississippi.¹ Upon due consideration, the court finds that the motion should be granted.

A. Factual and Procedural Background

The Plaintiff, Jerry Brown, originally filed this action on November 3, 1999, in the Circuit Court of Humphreys County, Mississippi, against Defendant Freedom Life Insurance Company of America. At that time, Freedom Life was incorporated in Mississippi. Plaintiff alleged that while he was covered by a "Heart Attack and Major Heart Surgery Insurance Policy" issued by Freedom Life, he suffered a heart attack. On February 19, 1999, Plaintiff had coronary artery bypass surgery performed and shortly thereafter submitted his claim for coverage to Freedom Life. In his complaint, Plaintiff alleged various causes of action against Freedom Life, including breach of the insurance contract in wrongfully failing to pay benefits, negligence, unjust enrichment, conversion, breach of the duty of good faith and fair dealing, and that Freedom Life's acts and/or omissions were grossly negligent and in reckless disregard for the contract rights of the Plaintiff.

¹Also pending before the court are the following additional motions : (1) Defendant Freedom Life's motion to strike Plaintiff's rebuttal, which shall be denied; (2) Defendant Freedom Life's motion to enjoin Plaintiff from pursuing state court proceedings, which shall be denied; and (3) the Plaintiff's request for costs, expenses and attorney's fees pursuant to 28 U.S.C. § 1447(c), and Rule 11 sanctions, which are discussed more fully herein.

On or about September 29, 2000, Freedom Life voluntarily dissolved its corporate existence within the state of Mississippi and reincorporated in Texas. On or about May 22, 2001, approximately 18 months after the original state court action was commenced, Plaintiff amended his complaint to add (in addition to Freedom Life) as Defendants Ascent Assurance, Inc., Ascent Management, Inc., and Patrick Mitchell, in both his individual and official capacities. Ascent Assurance, Inc. is incorporated in Texas and is the parent corporation of Freedom Life, owning 100% of Freedom Life's stock.² Patrick Mitchell is the President and Chief Executive Officer of Freedom Life; the President and Chief Executive Officer of Ascent Management; and the Chief Executive Officer of Ascent Assurance.

On June 25, 2001, Defendants removed this action to this court asserting that at the time of the amended complaint, none of the Defendants were Mississippi residents or corporations, and therefore, diversity jurisdiction exists. Thereafter, the Plaintiff motioned the court to remand this matter to state court because the original complaint was not removable as it named a non-diverse defendant and that removal is now time barred.

B. Discussion

I. General Principles

The burden is on the defendant to prove federal jurisdiction exists over the state court suit. Carpenter v. Wichita Falls Indep. Sch. Dist., 44 F.3d 362, 365 (5th Cir. 1995). Due to the significant federalism concerns removal raises, courts should strictly construe the removal statute. Carpenter, 44 F.3d at 365-66 (citing Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 809, 106 S.Ct. 3229, 3233, 92 L.Ed.2d 650 (1986); Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 107, 61 S.Ct. 868, 872, 85 L.Ed. 1214 (1941)). Further, all doubts must be resolved in favor of remand. Dodson v. Spiliada Maritime Corp., 951 F.2d 40, 42 (5th Cir.1992).

²Ascent Assurance also owns 100% of the stock of Ascent Management. Ascent Management is also incorporated in Texas. Patrick Mitchell's domicile for diversity purposes is Texas.

II. Timeliness of Removal

The procedure for removal is set forth by 28 U.S.C. § 1446. The pertinent part governing timeliness of removal is § 1446(b), which states:

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, *except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.*

28 U.S.C. § 1446(b) (1988). (emphasis added).

The Defendants argue that (1) this action was not commenced within the meaning of § 1446(b) until Plaintiff filed his amended complaint; or in the alternative (2) that filing the amended complaint actually began a new action and revived their right to remove; and finally (3) that the one-year proscription against removal on the basis of diversity is a procedural rule subject to waiver, estoppel and other principles of equity that should apply in the present case.

a. Commencement of an Action

The Defendants assert, in conclusory manner, that "this action was not commenced within the meaning of . . . § 1446(b) until Brown filed his Amended Complaint" Such arguments ignore both the language of the statute and relevant case law.

Under Mississippi procedural law, the law which governed the genesis of this action in the Circuit Court of Humphreys County, "[a] civil action is commenced by *filing* a complaint with the court." Miss. R. Civ. P. 3(a) (emphasis added). The rule is the same for commencement of an action in federal court. See Fed. R. Civ. P. 3. Our sister court in the Southern District of Mississippi has

addressed this issue and in that case found "that Defendant's removal of these actions was untimely pursuant to section 1446(b), since it filed its petitions for removal . . . more than one year after the cases were filed" even though the Plaintiff had moved to amend his complaint. Morrison v. National Benefit Life Ins. Co., 889 F. Supp. 945, 948 (S.D. Miss. 1995). Therefore, this argument by the Defendants is not well taken.

b. The First Paragraph of 28 U.S.C. § 1446(b) is Not Applicable to the Present Case

The Fifth Circuit has held that the first paragraph of § 1446(b) applies to cases which are removable as initially filed, the second paragraph applies to those cases which are not removable originally but become removable at a later time, and the one-year limitation on removals applies only to the second paragraph of that section, i.e., only to cases that are not initially removable. Johnson v. Heublein Inc., 227 F.3d 236, 241 (5th Cir. 2000); New York Life Ins. Co. v. Deshotel et al., 142 F.3d 873, 886 (5th Cir. 1998). The Fifth Circuit clearly pointed out the defendant phrase -- "except that a case may not be removed on the basis of diversity jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action"-- is incorporated into the second paragraph. New York Life, 142 F.3d at 886. The court also noted that the one-year limit on removal based on diversity jurisdiction establishes "a means of reducing the opportunity for removal after substantial progress has been made in state court." Id. (citations omitted). Substantial state court progress cannot occur in cases that are initially removable under the first paragraph of §1446(b), (unless, of course, the defendant fails to remove).

The present case was originally filed by Plaintiff Brown, a Mississippi citizen, in state court against Freedom Life, which at that time was incorporated in Mississippi. Therefore, "the case stated by the initial pleading [was] not removable" and the second paragraph of § 1446(b), including the one-year time limit, applies to this case.

c. Revival of Removal Right

Similar to the Defendants' argument that the action was not commenced until the amended

complaint, the Defendants argue that the "Amended Complaint changed the character of the action to such an extent that it constitutes a new action and the periods for removal began to run anew." Defendants argue that because the amended complaint is longer, adds approximately three or four new counts and additional Defendants, this "radically alters the nature of this litigation."

This court has already addressed this issue. In Jenkins v. Sandoz Pharmaceuticals Corp., the Defendants argued that the articulated exception allows removal in a situation "where the plaintiff files an amended complaint that so changes the nature of his action as to constitute 'substantially a new suit begun that day.'" Jenkins, 965 F. Supp. 861, 866 (N.D. Miss. 1997) (citing Wilson v. Intercollegiate (Big Ten) Conference Athletic Ass'n, 668 F.2d 962, 966 (7th Cir. 1982)). Along with noting that Wilson was decided before the 1988 statutory amendment to § 1446(b) which added the one-year limit for diversity cases, the court ultimately agreed with cases from other jurisdictions that the exception applies only to cases that were initially removable but the defendants waived their right to remove. Jenkins, 965 F. Supp. at 866-67 (citations omitted).

While the Fifth Circuit has not explicitly decided the issue, it has implied that the revival exception does not apply when the case is not initially removable. The court, in a case that was removable upon its initial pleading, stated "while the district court in Jenkins questioned whether the revival doctrine survived the 1988 amendment, it did not reach or decide the issue because the case as initially filed against defendant was not removable; therefore, it was governed by the second paragraph of § 1446(b) and did not involve a defendant's exercise of his right of removal under the revival exception." Johnson, 227 F.3d at 243, fn. 3.

In any event, the court in Jenkins stated that even had the Wilson exception applied in this case, it would not offer any relief to the Defendants. Jenkins, 965 F. Supp. at 867. The court noted "[a]lthough the Amended Complaint is much more thorough, and thus more lengthy, than the original Complaint, the substance the Plaintiffs claims-- namely, products liability and negligence-- remains the same." Id. In the present case, all of Plaintiff's claims relate to the same core breach of insurance

contract claim that Plaintiff initially filed against Freedom Life. Sometime after learning that Ascent Assurance owned Freedom Life and that Freedom Life sometimes "borrowed" employees or agents from Ascent Assurance and/or Ascent Management, Plaintiff asserted claims against them as well. All of the claims relate to the initial "Heart Attack and Major Heart Surgery Insurance Policy" issued by Freedom Life and their refusal to pay.

Defendants claim that Jenkins can be distinguished because there the original complaint named two Mississippi (non-diverse) defendants, and the amended complaint also included the two non-diverse defendants. Defendants assert that this case is different and should be removable since Freedom Life changed its place of incorporation subsequent to the complaint, and was a Texas citizen for diversity purposes at the time of the amended complaint. The Fifth Circuit has stated "[i]t seems to be without question that a change of citizenship occurring after the commencement of the action would not affect jurisdiction or the absence of it." Slaughter v. Toye Bros. Yellow Cab Co., 359 F.2d 954, 956 (5th Cir. 1966). Stated differently, jurisdiction is not affected by subsequent changes in the citizenship of the parties. Mas v. Perry, 489 F.2d 1396, 1398 (5th Cir. 1974). As such, the court finds that Defendants' arguments are without merit.

d. Waiver and Estoppel

Lastly, the Defendants assert that the one year limitation contained in § 1446(b) is procedural, and therefore subject to equitable considerations such as estoppel and waiver. Defendants cite Morrison for the proposition that in certain situations, a suit may be removed after more than one-year. Morrison, 889 F. Supp. at 951. As the parties recognize, this court has dealt with this issue before. Little v. New England Mutual Life Ins. Co., No. 1:98CV173, 1998 WL 527220 (N.D. Miss. July, 27 1998); Jenkins, 965 F. Supp. 861. In Jenkins, this court examined the facts of Morrison, which were distinguishable.

In Morrison, the plaintiffs engaged in forum manipulation by falsifying the amount of damages sought. Morrison, 889 F. Supp. at 949. One year and seven days after the action was commenced,

the plaintiffs filed a motion to amend their complaints to request an amount considerably more than the jurisdictional limit. Id. at 947. The defendants removed and the plaintiff filed a motion to remand based on the untimeliness of the removal notice. Id. Noting the deceitfulness of the plaintiffs' actions, the district court concluded that "the cases at bar cry out for a denial of Plaintiffs' Motion to Remand, because of their obvious attempt to manipulate the forum." Id. at 951. The court thus retained jurisdiction.

This court stated in Jenkins, with "all due respect, the court disagrees with the holding of Morrison." Jenkins, 965 F. Supp. at 869. The statutory language is unambiguous in providing that no diversity case may be removed more than one year after commencement of the lawsuit. 28 U.S.C. § 1446(b). Even had this court adopted the analysis set out in Morrison, the facts of this case do not lead to the conclusion that the Plaintiff waived his right to remand or is equitably estopped from remanding to state court. The present case is not an attempt to circumvent federal jurisdiction by waiting until a year after the complaint was filed to change the amount of damages sought to an amount over the threshold required for diversity cases. Nor does this case involve a scenario where the Plaintiff originally named non-diverse Defendants solely to defeat diversity jurisdiction and dismissed them after a year. Defendants seem to argue that since Plaintiff had either actual, or at least constructive knowledge that Freedom Life changed its place of incorporation before Plaintiff amended his complaint, he is now estopped from arguing that the case should be remanded. Plaintiff filed his original complaint against Freedom Life, and Freedom Life is still one of the Defendants in his amended complaint. As noted above, jurisdiction is not affected by subsequent changes in the citizenship of the parties. Plaintiff timely filed his motion to remand in which he stated that this action was not removable since the initial pleading was not removable and the case remained pending for more than one year. As such, the court finds the Defendants' arguments are without merit and Plaintiff's motion to remand should be granted.

III. Attorney's Fees and Costs

The Plaintiff also seeks an award of costs and expenses pursuant to 28 U.S.C. § 1447(c) which

states that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). The Fifth Circuit has made it clear that "the statute is discretionary" and the question to consider in applying § 1447(c) is "whether the defendant had objectively reasonable grounds to believe the removal was legally proper." Valdes v. Wal-Mart Stores, Inc., 199 F.3d 290, 292-93 (5th Cir. 2000). The propriety of the defendants' removal must be considered based upon an objective view of the legal and factual elements in each particular case. Valdes, 199 F.3d at 293. The court need not find that the defendant acted in bad faith or in a "vexatious, wanton, or oppressive" manner. News-Texan, Inc. v. City of Garland, 814 F.2d 216, 220 (5th Cir.1987).

As far as whether the defendant had objectively reasonable grounds to believe the removal was legally proper, the court notes that even in Morrison, where the court waived the one-year removal period, thereby allowing a defendant to remove an action to federal court more than one year after the action was commenced in state court, the court emphasized that the *plaintiff* attempted to manipulate the statutory rules governing federal jurisdiction and removal. Morrison, 889 F. Supp. 945 (holding that the plaintiff was equitably estopped from asserting the one-year limit on removal in a case in which the plaintiff's actions to manipulate the forum were obvious). A case after Morrison noted that "Federal District Courts in Mississippi have applied literally the one-year removal period, holding that a case may not be removed on diversity grounds if the Notice of Removal is filed more than one year after the case is commenced in state court." Turner v. Ford Motor Co., et al., 116 F. Supp. 2d 755, 758 (S.D. Miss. 2000).

In this case, as in Jenkins, the court exercises its discretion in favor of awarding to the plaintiff all costs and expenses, including attorney's fees, incurred as a result of the Defendants' removal.³ The

³Since the court is granting Plaintiff's request for costs and expenses pursuant to 28 U.S.C. § 1447(c), the court will not discuss further sanctions pursuant to Rule 11. Plaintiff has not separately briefed the issue, and the court finds sanctions are not warranted in this case.

court does not criticize the Defendants' use of the diverse legal theories submitted in support of retention of jurisdiction. However, the facts of this case do not support the various arguments that removal is proper, specifically the Defendants' contention that (1) this action was not commenced within the meaning of § 1446(b) until Plaintiff filed his amended complaint and therefore the first paragraph of § 1446(b) applied; (2) the Plaintiff's amended complaint revived the Defendants' right to remove; and (3) the Plaintiff should be equitably estopped from asserting the one-year limitation as a basis for remand.

This court encourages the parties to utilize their best efforts to resolve the fee matter without further court intervention. If an amicable resolution cannot be reached, however, the Plaintiff should submit to this court an itemized accounting of his costs and expenses incurred as a result of the removal.

C. Conclusion

In sum, the Defendants have not met their burden of proving federal jurisdiction exists over the state court suit. Freedom Life's citizenship at the time the complaint was filed was not diverse from the Plaintiff. This means that diversity of citizenship necessary to maintain federal jurisdiction over this case is absent. Furthermore, the plain language of the statute dictates that removal is now time barred. As such, this cause shall be remanded to the Circuit Court of Humphreys County for ultimate resolution. The court further exercises its discretion in favor of awarding to the Plaintiff all costs and expenses, including attorney's fees, incurred as a result of the Defendants' removal.

A separate order in accordance with this opinion shall issue this day.

This the ____ day of October 2001.

Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

JERRY BROWN

PLAINTIFF

VS.

NO. 4:01CV157-D-B

ORDER

Pursuant to an opinion issued this day, it is hereby ORDERED that

- (1) the Plaintiff's motion to remand (docket entry 21) is GRANTED;
- (2) this cause is hereby REMANDED to the Circuit Court of Humphreys County, Mississippi;
- (3) the Plaintiff's request for an award of attorney's fees pursuant to 28 U.S.C. § 1447(c) is GRANTED; and
- (4) Defendant Freedom Life's motion to strike and to enjoin Plaintiff from pursuing state court proceedings (docket entry 36) is DENIED.

SO ORDERED, this the _____ day of October 2001.

Chief Judge